Filed 7/20/09 In re J.R. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re J.R., A Person Coming Under the Juvenile Court Law.	B213937 (Los Angeles County Super. Ct. No. CK69297)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. R.R., Defendant and Appellant	

APPEAL from an order of the Superior Court for the County of Los Angeles. Marilyn H. Mackel, Referee. Reversed and remanded with directions.

Law Office of Lisa A. DiGrazia and Lisa A. DiGrazia, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the Los Angeles County Counsel, James M. Owens, Assistant County Counsel, and Fred Klink, Senior Deputy County Counsel, for Plaintiff and Respondent.

SUMMARY

The incarcerated father in this dependency case challenges the juvenile court's order terminating his parental rights and freeing his daughter for adoption. He asserts that the order must be reversed because (1) he did not sign a written waiver of his right to appear at the hearing at which his parental rights were terminated; (2) the order violated his right to substantive due process of law; and (3) the Department of Children and Family Services failed to comply fully with the notice requirements of the Indian Child Welfare Act (ICWA). We find that the order terminating the father's parental rights must be reversed for the limited purpose of ensuring compliance with the notice requirements of the ICWA.

FACTUAL AND PROCEDURAL BACKGROUND

R.R. is the father of J.R., who was placed in protective custody by the Department on July 24, 2007, along with two older half-siblings. J.R. was then five months old. The children were detained due to general neglect. Their mother's home was filthy and had no working electricity, and the Department alleged, among other things, that the mother had a seven-year history of substance abuse and was a current user of illicit drugs. As to R.R., the Department alleged he failed to provide his daughter with the basic necessities of life and his whereabouts were unknown.

R.R. appeared in juvenile court on September 25, 2007, and counsel was appointed for him. He was then in custody for a parole violation, having been incarcerated in June 2007, but was scheduled for release in October. He asked that his relatives be investigated for placement, and the court (Commissioner Mackel) ordered the Department to assess relatives of all the children and to make an effort to place them together. (All three children were eventually placed with the maternal grandfather and his domestic partner, with whom they thrived.)

A hearing was scheduled for November 7, 2007, and on that date, the Department filed an amended petition against the father under Welfare and Institutions Code section

300, subdivision (b).[1] The Department alleged the father had an extensive criminal history, including two misdemeanor and two felony convictions for drug activity, and that his history of drug convictions created a detrimental home environment, placing his daughter at risk of physical and emotional harm and damage. At the hearing, the father's counsel stated the father's intention to file a demurrer to the allegations, because the father had been released from prison and his criminal history was irrelevant. (According to the mother, R.R. had provided for the child until he was incarcerated in June 2007.) The father also asked that J.R. be released to him. The court denied the request, but ordered the Department to assess the father as a potential caretaker for the child, and gave the Department the discretion to release the child to him, if appropriate. An adjudication hearing was scheduled for January 8, 2008.

In early November, 2007, the social worker initially recommended that the father be provided family reunification services, and that he participate in a parenting class and drug and alcohol program, as well as submit to random drug testing. The social worker rejected the father's suggestion that J.R. live with the father's parents while the father was living with them, and observed that the father could not identify a place where he could live if he were to move out of his parents' home.

By the time of the January 8, 2008 hearing, the father was again in custody, having been arrested on November 27, 2007. The juvenile court sustained the Department's petition as to the father, as amended to add that the father was currently incarcerated on a drug-related offense. Counsel for the Department observed that no reunification services should be offered to the father, because he would be incarcerated beyond the period of reunification (usually six months for a child of J.R.'s age).[2] (The

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[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

[2] Family reunification services, when ordered, are provided for the period beginning with the dispositional hearing and ending with the six-month review hearing, "[f]or a

father's sentence was five years; he had been told he would be out of prison in two and a half years.) The father's counsel requested reunification services, observing the father was "very motivated and interested" and had indicated to counsel that he intended to participate in "all the programs that are offered to him where he is incarcerated." The Department rejoined that the father "always has an opportunity to participate in programs and demonstrate through a 388 [a section 388 petition to modify a previous order] if he were to have a change in circumstance," but even if he were released in two and a half years, that "still far exceeds the period for reunification."

The court then found, by clear and convincing evidence, "that to return the [child] into the care and custody of the father would pose substantial detriment." The court ordered no reunification services for the father, under section 361.5, subdivision (e)(1), observing that J.R. was less than one year old, the father "is in custody beyond the period of time for reasonable reunification services," and that he had only "arguably four months of contact with the child."[3] The father did not appeal the juvenile court's order.

Thereafter, the mother failed to reunify with the children (as did the fathers of the other two children), and on September 18, 2008, a permanency planning hearing was scheduled for November 19, 2008. (The children, by then, had been placed with the maternal grandfather and his partner, who wished to adopt them.) The father was in court on September 18, 2008, and his counsel told the court that the father objected to the

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child who, on the date of initial removal from the physical custody of his or her parent . . . was under three years of age . . . ." (§ 361.5, subd. (a)(1)(B).)

[3] Section 361.5, subdivision (e) provides in part: "If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, the likelihood of the parent's discharge from incarceration or institutionalization within the reunification time limitations described in subdivision (a), and any other appropriate factors." (§ 361.5, subd. (e)(1).)

termination of his parental rights, but would be incarcerated until 2011. The court inquired whether the father wished to return to court for the permanency planning hearing, and counsel stated that the father was waiving his appearance. The court then advised the father that "the recommendation is to terminate parental rights and given the posture of this case it is highly likely that the court will be terminating your parental rights at the next hearing." The father stated that he understood he was waiving his rights to be at that hearing.

On November 19, 2008, the hearing was continued to January 20, 2009, because the home study for the prospective adoptive parents had not been completed, and on December 18, 2008, the father signed a waiver of his right to attend the January 20 hearing. The January 20, 2009 hearing was held before Commissioner Debra Losnick; Commissioner Mackel was not sitting on that date. Commissioner Losnick took the appearances of counsel and continued the matter to February 3, 2009, "back in Department 402 . . . ." Counsel for J.R.'s father (who was standing in for his appointed counsel) then said: "I would request a continuance on behalf of father. I know he would have wanted to be here, and he objects to termination of his parental rights." Commissioner Losnick responded, "We are setting it for hearing on February 3rd, but both fathers signed validly executed waivers." When the court asked if there were any other issues, father's counsel said, "a state-wide for the father" (an order for his transport to the hearing), and the court responded, "I am not ordering a state-wide."

At the hearing on February 3, 2009, before Commissioner Mackel, the father's regularly appointed counsel appeared on his behalf. The court began by indicating that notice was proper, "including a waiver from the father at Pelican Bay, I believe." Counsel confirmed that the father waived his appearance, but objected to termination of his parental rights:

> "On behalf of my client, I had many letters from my client. He did waive his appearance but he would like the court to know that he would be objecting to the terminating of his parental rights. I was hoping that the grandfather would take him to indeed see the father. He says that I

> apologize for taking the time but my child really means a lot and I am taking this time to let you know that my daughter [J.R.] means a lot to the father and that he fought for her until the end, he never gave up on her like her mother has. [¶] I am willing to do anything within the law to prevent the court from terminating my parental rights so that has been his position all along. He is not going to be released until 2010 and he wants me to object."

After hearing from counsel for the other fathers, the mother and the Department, the court found, by clear and convincing evidence, that the children were adoptable and would be adopted, and that no exception existed to avoid the termination of parental rights. The court thereupon terminated the parental rights of all the parents, and ordered the Department to proceed with the adoptive placement.

J.R.'s father filed a timely appeal from the order terminating his parental rights.

DISCUSSION

The father challenges the order terminating his parental rights on three grounds: the absence of a written waiver of his right to appear at the February 3, 2009 hearing; violation of his substantive due process rights because termination of his parental rights was based solely on his incarceration and without "specific findings of parental unfitness"; and improper notice under the ICWA. The first two points are not well-taken, but we find, and the Department concedes, that notice was insufficient under the ICWA, requiring a limited reversal.

1. The absence of a signed waiver.

Penal Code section 2625, subdivision (d) states that no proceeding may be held under section 366.26 (termination of parental rights) or various subdivisions of section 300 (the adjudication of a child's dependency) "without the physical presence of the prisoner or the prisoner's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner" (or an affidavit signed by the warden stating the prisoner has indicated an intent not to appear at the proceeding). The Supreme Court has held that absent a waiver, Penal Code section 2625, subdivision (d) requires the

presence of both the prisoner and his counsel. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 623-624 (*Jesusa V.*).) We also recognize that there is authority for the proposition that a waiver of appearance at a specific hearing does not automatically apply to a subsequent hearing. (*In re Julian L.* (1998) 67 Cal.App.4th 204, 208 [court improperly relieved mother's counsel without timely appointing a substitute, and erred in concluding that the mother's waiver of appearance at the permanency planning hearing constituted a waiver of appearance at the continued hearing four months later].)

In this case, the father argues that his waiver of appearance at the January 20 hearing did not apply to the February 3 hearing, and the trial court did not have clear and convincing evidence that he voluntarily and knowingly waived his presence at the February 3 hearing. (See *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 389-390 [waiver of a statutory right must be knowing and intelligent; burden is on party claiming waiver to prove it by clear and convincing evidence].) The father points out that: (a) counsel who appeared for his appointed counsel at the January 20 hearing stated that the father "would have wanted to be here," and asked for statewide removal orders for the father for the February 3 hearing, which the court refused; and (b) although his duly appointed counsel expressly advised the court that the father waived his right to appear on February 3, her statements to the court "are not evidence" and "it is entirely unclear whether counsel directly communicated with [father] specifically in that regard" or whether instead she erroneously believed father's prior waiver was valid for the continued hearing date.

We need not determine whether there was sufficient evidence that the father waived his right to be present, because any error was harmless. (*Jesusa V., supra*, 32 Cal.4th at pp. 624, 625 [harmless error analysis applies when a prisoner is involuntarily absent from a dependency proceeding; while juvenile court erred in proceeding without father's presence or waiver of that right, "'error is reversible only if it is reasonably probable the result would have been more favorable to [father] absent the error'"].)

The issue at the permanency planning hearing was whether J.R. was likely to be adopted. "If the court determines, . . . by a clear and convincing standard, that it is likely

the child will be adopted, the court shall terminate parental rights and order the child placed for adoption."[4] (§ 366.26, subd. (c)(1).) As the juvenile court observed here, none of the statutory exceptions to this principle applied, and the father does not contend otherwise on appeal. The father does not suggest that he ever had, or now has, any evidence to present on the only issue that was before the juvenile court -- whether J.R. was likely to be adopted. In fact, the evidence on that point was uncontradicted: J.R. was then living with her prospective adoptive parents and thriving in their care, and the adoptive home study had been completed and approved. In short, any error in proceeding in the father's absence was harmless: "[O]ne can say with confidence that '[n]o other result was possible' even if [the father] had been present." (*Jesusa V.*, *supra*, 32 Cal.4th at p. 626.)

2. The substantive due process claim.

The father contends that the court's denial of reunification services and termination of his parental rights violate his right to substantive due process, because the termination was based on his incarceration, rather than on findings of detriment or unfitness as a parent. He relies principally on two cases, in which the court of appeal reversed judgments terminating the parental rights of incarcerated parents, both courts stating that there is no "'Go to jail, lose your child'" rule in California. (*In re S.D.* (2002) 99 Cal.App.4th 1068, 1077 (*S.D.*); *In re Brittany S.* (1993) 17 Cal.App.4th 1399, 1402 (*Brittany S.*).) The father also asserts that his right to due process was violated when his

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[4] "The court has four choices at the permanency planning hearing. In order of preference the choices are: (1) terminate parental rights and order that the child be placed for adoption . . . , (2) identify adoption as the permanent placement goal and require efforts to locate an appropriate adoptive family; (3) appoint a legal guardian; or (4) order long-term foster care. [Citation.] Whenever the court finds 'that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption.' [Citation.]" (*In re Celine R.* (2003) 31 Cal.4th 45, 53.)

parental rights were terminated without the "multiple specific findings of parental unfitness" he claims are required under *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 253 (*Cynthia D.*).

The Department argues that we do not have to reach the merits of these arguments because the father failed to appeal the denial of reunification services (on January 8, 2008). The father counters with the clerk's untimely writ advisement in connection with the order setting the section 366.26 hearing, and with case law allowing earlier rulings to be challenged on appeal from the termination order if the writ advisement was not timely. We do not address this issue because assuming, *arguendo*, that the father preserved his constitutional challenge for appeal, on the merits, his arguments fail for lack of support in the record and the law.

The father did not lose his parental rights simply because he was incarcerated. Under section 361.5, subdivision (e), the court may deny reunification services to an incarcerated parent if the court determines, by clear and convincing evidence, that those services would be detrimental to the child. (§ 361.5, subd. (e)(1).) The statute specifies the factors that the court must consider in determining detriment under these circumstances. (See footnote 3, *ante*.) These factors include, among others, the age of the child (here, 10 months old when services were denied), the degree of parent-child bonding (here, none, because J.R. was only four months old when the father was incarcerated), the length of the sentence (five years), the nature of the crime (drug related), the degree of detriment to the child if services were not offered (none), and the likelihood of the parent's discharge from incarceration within the reunification time (none). We find that the record amply supports the court's denial of reunification services to the father.

S.D. and *Brittany S.* do not merit a different conclusion; they are factually inapposite. In *S.D.*, the court of appeal found that dependency jurisdiction was improper from the beginning, and the mother's counsel was ineffective in failing to advise the mother accordingly. More specifically, there was no allegation or evidence in that case

that the mother was unable to arrange for the care of the child during her incarceration. The only basis for the trial court's jurisdiction over the minor was that the father was missing and the mother was unable to care for the child due to her incarceration. "Such inability [to arrange for care] is the key fact that allows the court to take jurisdiction over the child of an incarcerated parent when there are no other grounds for doing so." (*S.D., supra,* 99 Cal.App.4th at pp. 1070-1071.) Hence the court's comment that there is "no 'Go to jail, lose your child' rule in California." (*Id.* at p. 1077.)

In *Brittany S.*, the juvenile court ordered reunification services for the incarcerated mother with no visitation rights, even though the mother was otherwise complying with the drug abuse counseling and other aspects of her reunification plan. Reasoning that if the juvenile court orders a reunification plan, it must be a reasonable one, the appellate court observed that "[b]y not providing visitation, [the social services agency] virtually assured the erosion (and termination) of any meaningful relationship between [the mother] and Brittany." (*Brittany S., supra*, 17 Cal.App.4th at p. 1407.) In further distinction from the facts here, the *Brittany S.* court noted that the juvenile court did not find that reunification services would be detrimental to the child. (*Id.* at p. 1406.)

The father next argues that he was deprived of his substantive due process right to "multiple specific findings of parental unfitness" cited in *Cynthia D*. because once the court improperly denied him reunification services based merely on his incarceration, termination of his parental rights was a foregone conclusion.

In *Cynthia D.*, the Supreme Court rejected the mother's argument that the dependency statutory scheme violates due process because it allows termination of parental rights based on a lesser standard of proof than clear and convincing evidence. (*Cynthia D., supra,* 5 Cal.4th at pp. 245, 248.) After reviewing the statutory dependency scheme, the Supreme Court reasoned that by the time dependency proceedings have reached the stage of a section 366.26 hearing, "there have been multiple specific findings of parental unfitness," including a finding at the dispositional hearing, by clear and convincing evidence, that the child must be removed from the parents, and including a

series of review hearings at which the Department must establish, by a preponderance of the evidence, that the return of the child to the parent would create a substantial risk of detriment to the child. (*Cynthia D., supra,* 5 Cal.4th at pp. 248-249.) The Supreme Court further explained:

> "By the time termination is possible under our dependency statutes the danger to the child from parental unfitness is so well established that there is no longer 'reason to believe that positive, nurturing parent-child relationships exist' [citation], and the *parens patriae* interest of the state favoring preservation rather than severance of natural familial bonds has been extinguished. At this point . . . it has become clear 'that the natural parent cannot or will not provide a normal home for the child' [citation], and the state's interest in finding the child a permanent alternate home is fully realized. In light of the earlier judicial determinations that reunification cannot be effectuated, it becomes inimical to the interests of the minor to heavily burden efforts to place the child in a permanent alternative home. By the time of the section 366.26 hearing, no state interest requires further evidence of the consequences to the child of parental unfitness, let alone evidence that meets an elevated standard of proof." (*Cynthia D., supra,* 5 Cal.4th at p. 256.)

The father seizes on the Supreme Court's reference to "multiple specific findings of parental unfitness," to argue that he was deprived of the benefits of these "multiple specific findings of parental unfitness" when he was denied reunification services. The father's argument takes *Cynthia D.* out of its context. *Cynthia D.* described the usual course of a dependency proceeding, during which reunification services are offered to the parent and "there have been a series of hearings involving ongoing reunification efforts . . . ." (*Cynthia D., supra,* 5 Cal.4th at p. 253.) In these cases, the parental rights termination stage is reached only if "over this entire period of time, the state continually has established that a return of custody to the parent would be detrimental to the child . . . ." (*Ibid.*)

Here reunification services were denied to the father, *based on clear and convincing evidence*, at the dispositional hearing, and accordingly there were no "ongoing reunification efforts" as to the father, and no further review hearings. As

analyzed above, the record supports that denial under the factors set forth in section 361.5, subdivision (e)(1). The father has not cited any legal authority for the proposition that he has a constitutional right to family reunification services based on the record here. (Cf. *In re Joshua M.* (1998) 66 Cal.App.4th 458, 476 [rejecting argument that denial of family reunification services under section 361.5, subd. (b) violates due process and reasoning under equal protection analysis that "[r]eunification services are a benefit, and there is no constitutional 'entitlement' to these services"].) As *Cynthia D.* observed, by the time of the permanency planning hearing, "it has become clear 'that the natural parent *cannot or will not provide a normal home* for the child' [citation], and the state's interest in finding the child a permanent alternate home is fully realized." (*Cynthia D., supra,* 5 Cal.4th at p. 256, emphasis added.) That is true here as well.

3. ICWA notice requirements.

The father contends that the Department's notice under the ICWA was defective;[5] the Department concedes the point. We agree, and grant a limited reversal on that basis.

The ICWA allows an Indian tribe to intervene in dependency proceedings, to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . ." (25 U.S.C. § 1902.) The ICWA contains specific notice requirements that apply when the juvenile court knows or has reason to know that an Indian child is involved. (25 U.S.C. § 1912(a).) The Indian tribe determines whether the child is an Indian child, and its determination is conclusive. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 702 (*Francisco W.*).) The juvenile court "'needs only a suggestion of Indian ancestry to trigger the notice requirement.'" (*Id.* at p. 703.) Under the ICWA,

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[5] Although the father does not claim to have Indian ancestry, he has standing to assert violations of the ICWA's notice requirements. (*In re Jonathon S.* (2005) 129 Cal.App. 4th 334, 339.)

no foster care placement or termination of parental rights proceeding may be held until at least 10 days after the tribe receives notice. (25 U.S.C. § 1912(a); see § 224.2, subd. (d).)

ICWA notice requirements are strictly construed, and must contain enough information to be meaningful. (*Francisco W., supra*, 139 Cal.App.4th at p. 703.) In 2006, the Legislature enacted section 224.2 of the Welfare and Institutions Code, which "largely tracks the ICWA . . . ." (*In re Rayna N.* (2008) 163 Cal.App.4th 262, 266.) Section 224.2 provides that notice "shall include all of the following information" (§ 224.2, subd. (a)(5)), a list which includes "[a]ll names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known." (§ 224.2, subd. (a)(5)(C).) "It is essential to provide the Indian tribe with all available information about the child's ancestors, especially the ones with the alleged Indian heritage." (*Francisco W., supra*, 139 Cal.App.4th at p. 703.)

In this case, the mother told the Department that her grandfather had Native American Indian heritage, although she was unsure of the tribe or to what degree. The maternal grandmother informed the Department she believed she had Yaqui affiliation, and notices were sent on September 10, 2007, to the Bureau of Indian Affairs and the Pascua Yaqui Tribe. The notices gave only the name, date and place of birth of the maternal grandmother, and the name and birth date of the maternal great-grandfather (who was deceased).

Despite the fact that the caseworker was in communication with both the maternal grandmother and the maternal great-grandmother, the notices did not provide the maternal grandmother's address, and gave no other information on other relatives or the required information on non-Indian relatives, but gave the wrong information regarding the father's birth date. The Pascua Yaqui Tribe's response to those defective notices stated that the minors, their mother, and their fathers were not members of the tribe and, "[b]ased upon the family information provided and the current enrollment records, the children are not eligible for membership and the Tribe will not intervene in this matter."

The Department concedes that more information should have been obtained from the maternal grandmother and great-grandmother about J.R.'s ancestors and included in the notices. (See *Francisco W., supra*, 139 Cal.App.4th at p. 704 [the agency "easily could have contacted the paternal grandmother for additional pertinent information"]; *In re D.T.* (2003) 113 Cal.App.4th 1449, 1455 [social worker's affirmative duty to inquire whether the minors might be Indian children "mandated, at a minimum, that she make some inquiry regarding the additional information required to be included in the ICWA notice"; "[w]ith only the names, birth dates and birthplaces of the minors and the parents, it is little wonder the responses received were that the information was insufficient to make a determination or that the minors were not registered or eligible to register"].)

The father and the Department agree that the failure to comply with the ICWA's notice requirements requires a reversal. They disagree on the scope of that reversal. The Department contends that we should issue a limited reversal, and instruct the trial court to comply fully with the ICWA, and if J.R. is determined not to be an Indian child, to reinstate its judgment terminating the father's parental rights.

The father argues that the defective ICWA notice requires us to reverse the termination of the father's parental rights, "along with the dispositional order and subsequent orders." The father provides no authority for his proposed disposition. The case law is to the contrary. (*Francisco W., supra*, 139 Cal.App.4th at pp. 704-709 [because it is consistent with the best interests of the child, affirming the appellate practice of reinstating the trial court's judgment if the child is not determined to be an Indian child where the only error on appeal was defective ICWA notice, and rejecting a substantive due process challenge to that appellate practice]; *In re Elizabeth W.* (2004) 120 Cal.App.4th 900, 909 [granting limited reversal after inadequate ICWA notice, and ordering reinstatement "immediately" if the child is not an Indian child within the meaning of the ICWA].)

DISPOSITION

The order terminating parental rights is reversed, and the case is remanded to the juvenile court with directions to order the Department to comply with the notice provisions of the ICWA, and to file all required documentation with the juvenile court for the court's inspection. If, after proper notice to the Yaqui tribe, the tribe claims J.R. is an Indian child, the juvenile court shall proceed in conformity with all provisions of the ICWA. If, on the other hand, the Yaqui tribe does not claim that J.R. is an Indian child, the judgment terminating parental rights shall be reinstated.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BENDIX, J.*

We concur:

FLIER, Acting P. J.

BIGELOW, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.